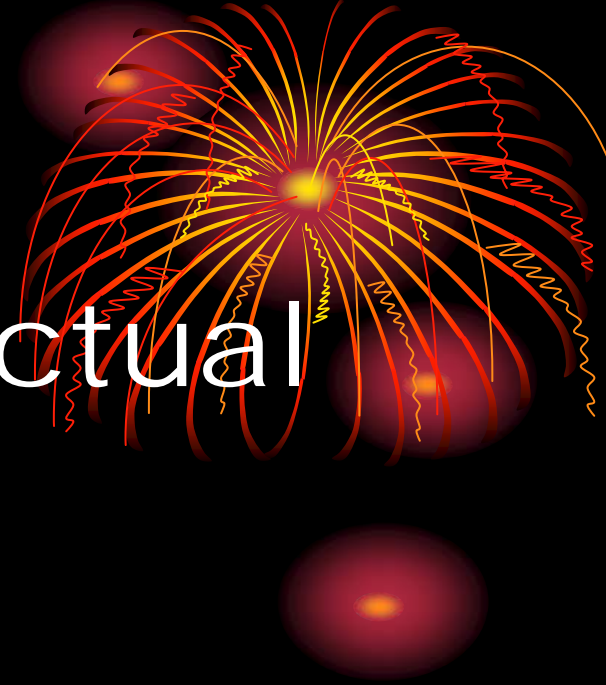


Protection Intellectual property in China



- Luo xia
- Supreme People's Court, PRC
- September 7, 2006, CA

The IP legislation in China



The legislation in China consists of **national laws** (i.e., constitution and laws which promulgated by the National People's Congress & its Standing Committee and have highest binding force), **administrative** and **local regulations** (laid down by the State Council and the Provincial Congresses), **rules** (rules: no binding force to courts, for reference only) and **measures** (issued by the central governmental agencies and local governments) as well as **judicial interpretations** (stipulated by the Supreme People's Court and the Supreme People's Procuratorate).

The IP legislation in China



- Substantive law:

Trademark Law

The Patent Law

The Copyright Law

Contract Law (1999) (technology contract issues)

Anti-Unfair Competition law (1993) (in Article 5, 9, 10, 14.)

Criminal Law (1997)---- seven kinds of IP Crimes.

Regulations:

Protection of Computer Software

New Varieties of Plant

Topographies of Integrated Circuits

The IP legislation in China

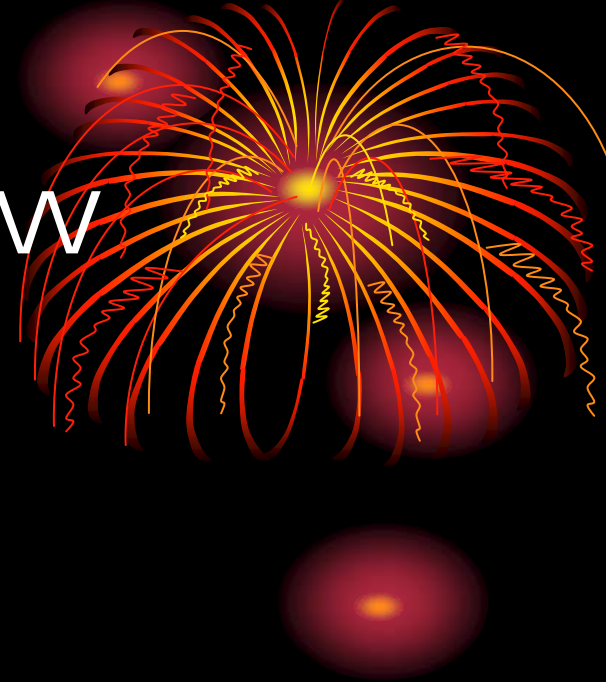


- **The scope of judicial protection of IP**

The areas of IPR :copyright and related rights/ trademarks /patents /the protection of new varieties of plants /the layout-designs of integrated circuits /undisclosed information

- Basically three types court divisions
 - Civil Division / Administrative Division /Criminal Division
- **Three procedure Laws**
 - Civil Procedure Law (1991)
 - Administrative Procedure Law (1989)
 - Criminal Procedure Law (1996)
 - The Regulations for Customs Protection of IP (procedural +substantive rules)

Litigation Overview



- **Three types of litigation**
 - **Civil** → π : IPR owner
 Δ : alleged infringer
 - **administrative** → π : IPR owner
 Δ : administrations
 - **criminal** → π : prosecutor / IPR owner
 Δ : the alleged infringer
- . **Private prosecution**

Litigation Overview



- Possible Liability :
- **civil LIA:** *immediate cessation of infringing conduct, compensation for losses, elimination of harmful effects and dangers, and making public apology.*
- **administrative LIA :** *immediate cessation of infringing conduct, confiscation, destruction of infringing goods and tools specially used for manufacturing the infringing goods, and monetary fine*
- **criminal LIA:** *punished with imprisonment of no more than 7 years or criminal detention (less than 6 months) along with a fine, or a separate fine.*
- **separately/ simultaneously**

Major organs of enforcement of IP = courts + designated administrations



Designated administrations:

- acquisition & maintenance of IPRs

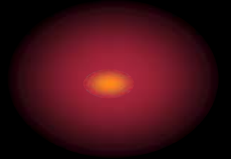
three major IP agencies : *the state intellectual property office (SIPO), the state administration for industry & commerce (SAIC) and the national copyright administration (NCA) are three major ip organs. more precisely, the patent office and the patent re-examination board (PRB), both were set up by the SIPO but independent to each other, are in charge of granting and maintenance (i.e., revocation) of patent rights respectively. similarly, the trademark office and the trademark review & adjudication board (TRAB), which are independently divisional parts of the SAIC, are responsible for the granting and maintenance (i.e., opposition & cancellation) of trademark rights respectively. the NCA administers the voluntary registration of copyright.*

the ministry of agriculture and the national administration of forest
general administration of customs

enforcement of IP---

designed administrations

- grant and maintenance of IPR
 - dealing with infringements
 - Courts: play vital role + final decision-making
 - Disputes concerning the validity of IPRs:
 - re-examination boards (before 2001)
- judicial review (Administrative litigation)
- cases determining whether or not to grant IP rights, cases concerned with maintaining or canceling the rights cases of compulsory licensing or compulsory licensing fees.
- 1st instance in No.1 Intermediate Courts of Beijing
 - 2nd instance in the High Court of Beijing
 - SPC (w/ writ of certiorari)

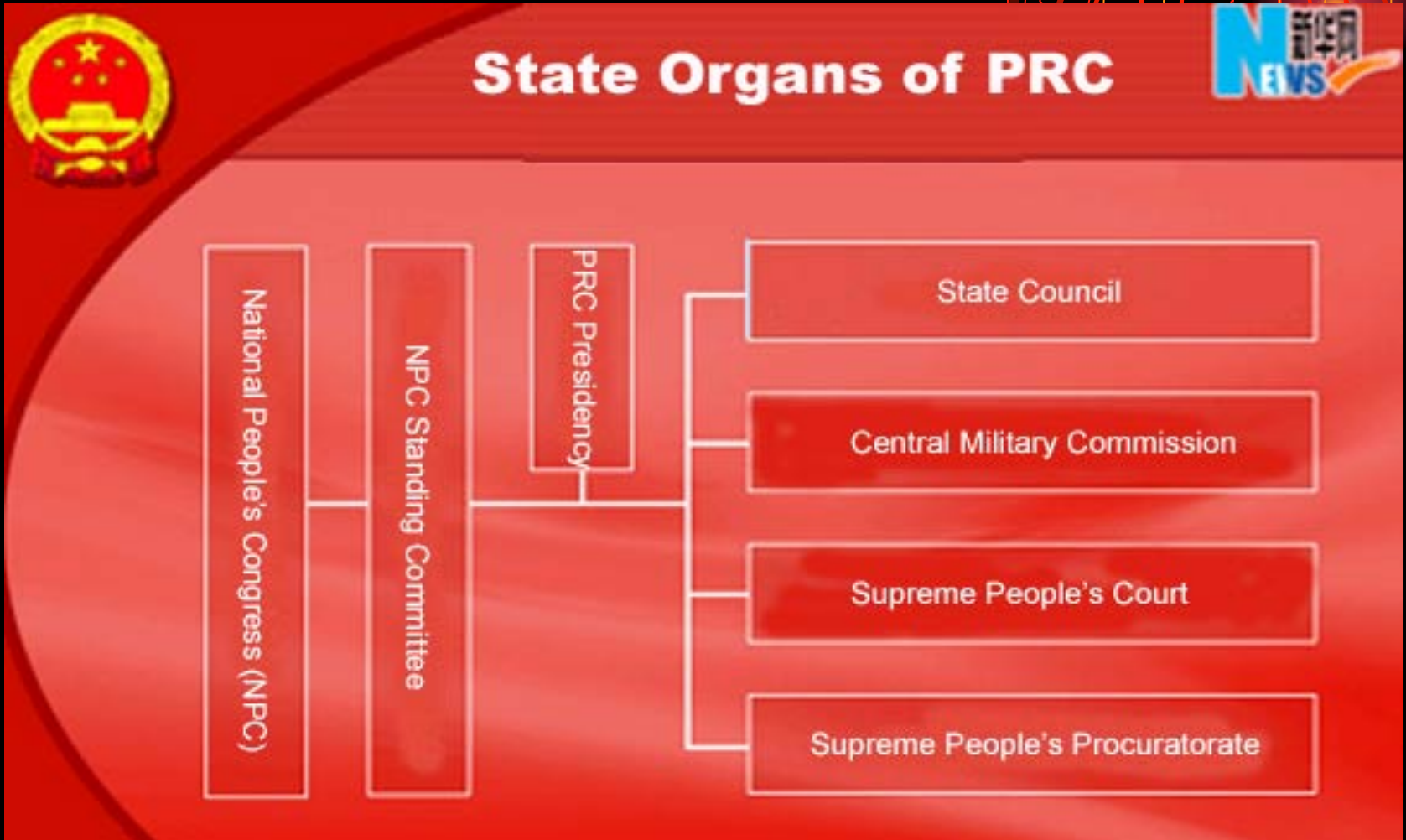


Criminal Litigation



- defines 7 kind of the crime of IP infringement.
 - the crime of passing off another's registered trademark,
 - the crime of selling products bearing a counterfeit trademark,
 - the crime of illegally producing and/or illegally selling produced representations of a registered trademark,
 - the crime of counterfeiting a patent,
 - the crime of copyright infringement,
 - the crime of selling infringing reproductions,
 - the crime of infringing on business secrets.
- criminal liability
- Criminal Procedure Act
- Jurisdiction

State Organs of PRC



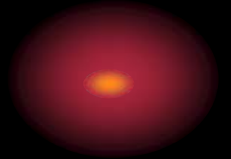


- The hierarchy of the Chinese court system consists of four tiers of courts.
- China does not have a Patent Court or an IP Court specifically dealing with all patent or IP civil cases.
- China set up the IP division in 1993
- Civil litigation--JURISDICTION

Is litigation expensive and time consuming? Are there competent judges?



- The time period and costs for IP civil actions
- Statutory period of trial for domestic cases
 - 1st instance: 6 months + 6 months extension
 - 2nd instance: 3 months + extension
- No such statutory period for foreign related cases, but basically same as domestic cases in practice, generally can be concluded within a reasonable term
- Less than in many other countries in practice, but patent cases maybe longer than others

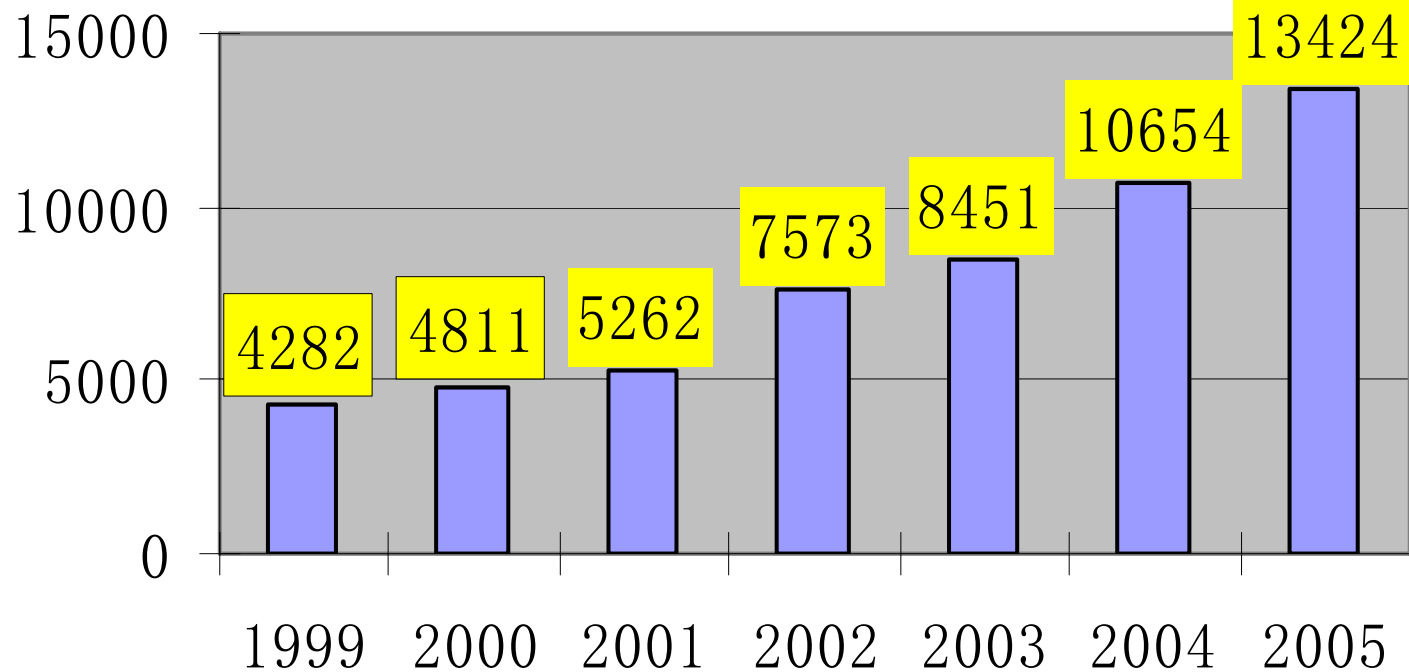


Qualified judges:



- Law degree requirement in general since 1995.
- Judge's uniform examination since 1995
- Uniform judicial examination since 2002: only about 6-7% passed
- Specialized training in Judges Colleges: pre-nomination
- Regular training for specialized judges of incumbency
- National Judges College: for senior judges
- Local judges Colleges: for ordinary judges
- Study abroad: US, UK, Canada, Australia, Japan, Germany, France, etc.
- Nominating higher courts judges from lower courts

Increase of IP Civil Cases 1999 - 2005



Pre-trial Provisional Measures



- provided by law--Established in 2000 –2001
 - pre-trial injunction / preliminary injunction
 - Pre-trial Preservation of Evidence
 - Pre-trial Preservation of property
- Time for filing application:
 - separately / simultaneously
 - before filing the case/ in the course of proceedings

Pre-trial Provisional Measures



- Filing an application
 - the likelihood of infringement
 - on-going or imminent infringement
- Application for reconsideration
- Implementation
- Application for implementation
 - Decision 48hrs --reconsideration—
terminate.

Pre-trial Provisional Measures

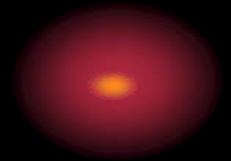


- Pre-trial Preservation of Evidence
- irreparable harm /irreparability of losses
- bond / counter bond
- Grounds for application
- *Sum of bond should be reasonable and in the limit of recovering losses of respondent and paying expenses for implementation of the injunction.*
- *Sum of bond for pre-trial preservation of evidence should be limited to the value of the seized goods and paying expenses for implementation of the order. Credit bond provided by companies of good reputation can be recognized.*

Pre-trial Provisional Measures



- Implementation: within 48 hours
- Application for reconsideration



SPC's basic attitude

-- actively but cautiously



Statistic shows:

- Enforcement of Preliminary Injunction
 - Up to Oct, 2005:
 - Totally 300 applications received, 296 concluded (foreign related 25)
 - 76 granted, 23 dismissed, 97 withdrawn or other
 - actual approval rate: 88%
 - 200 applications for patent injunction, 197 concluded (foreign related 19)
 - 109 granted, 14 dismissed, 74 withdrawn or other
 - actual approval rate: 88%

SPC's basic attitude

-- actively but cautiously



Statistic shows:

Enforcement of Pre-trial Preservation of Evidence

Up to Oct, 2005:

- Totally 470 applications received, 445 concluded
(foreign related 7)

301 granted, 21 dismissed, 123 withdrawn or other

- actual approval rate: 93%

- 215 applications for patent cases, 199 concluded
(foreign related 5)

165 granted, 11 dismissed, 23 withdrawn or other

- actual approval rate: 93%.

Calculation of Damages



- Principle of compensation
 - compensatory rather than punitive
- Calculating Methods
 - loss of IP owner: *multiplying the reduced sales volume of patented products by the profit per patented product.*
 - gains of infringer *multiplying sales volume of infringing products by the profit per infringing product* --(shifting burden of proof):
 - referring to royalty (1-3 times in patent infringements)
 - statutory damages (no more than ¥500,000)

Whether lawyers' fees should be included within the "reasonable expenses"?



- According to Article 22 on Judicial Interpretations on Trial of Patent Disputes (2001) the people's court may, on the request of the rightholder and according to the specific facts of a case, including the reasonable expenses paid for investigation or for stopping the infringement within the amount of compensation.

Supreme People's Court, PRC



Thank you very much for your
patience.



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Note:

The SPC is the highest judiciary of the state.

- The SPC is the highest judicial organ of the state. It exercises the state judicial power in accordance with the provisions of the constitutions, supervises the judicial work of local people's courts at all levels and special people's courts, and holds itself responsible to the national people's congress and its standing committee.
- SPC is authorized to hear the criminal civil and administrative cases of first or second instance, and which it has jurisdiction as provided by the law or that it deems necessary to be heard by itself, to review and approve the judgments and decisions made on case of capital punishment, to accept the cases of appeals and petitions for retrial against judgments or decisions rendered by the lower people's courts or special people's courts and hear or assign the lower courts to retry the cases filed for review, when errors are definitely found; to hear the protested cases lodged by the SPP pursuant to the judicial supervision procedure, to assign the due courts to handle the cases over which the jurisdiction of the lower courts is not explicitly prescribed, it has general supervisory jurisdiction over all the cases dealt with by the people's courts and special people's courts at all levels.

